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APPLICATION NO.	FILING DATE	FIRST NAMED INVENTOR	ATTORNEY DOCKET NO.	CONFIRMATION NO
10/674,553	09/30/2003	Erik J. van der Burg	MVMDINC.1CP1C3	5764
20995	7590 10/02/2006		EXAMINER	
	ARTENS OLSON &	DAWSON,	DAWSON, GLENN K	
2040 MAIN STREET FOURTEENTH FLOOR			ART UNIT	PAPER NUMBER
IRVINE, CA 92614			. 3731	
			DATE MAIL ED. 10/02/2006	

Please find below and/or attached an Office communication concerning this application or proceeding.

1) Responsive to communication(s) filed on 30 August 2006. 2a) This action is FINAL. 2b) This action is non-final. 3) Since this application is in condition for allowance except for formal matters, prosecution as to the merits is closed in accordance with the practice under Ex parte Quayle, 1935 C.D. 11, 453 O.G. 213. Disposition of Claims 4) Claim(s) 1-5.38-50.55-61.63.64.66-71 and 85-91 is/are pending in the application. 4a) Of the above claim(s)				$\langle \gamma \rangle$			
Examiner Since S			Application No.	Applicant(s)			
Glenn K. Dawson 3731			10/674,553	VAN DER BURG ET AL.			
The MAILING DATE of this communication appears on the cover sheet with the correspondence address — Period for Reply A SHORTENED STATUTORY PERIOD FOR REPLY IS SET TO EXPIRE 3 MONTH(S) OR THIRTY (30) DAYS, WHICHEVER IS LONGER, FROM THE MAILING DATE OF THIS COMMUNICATION. Extensived for time may be available under the provisions of 37 CPT 1.1360, in no event, however, may seeply the string field If NO period for reply is specified above, the maximum statutory period will apply and will expire SIX (8) MONTHS from the mailing date of this communication, and the period for reply is specified above, the maximum statutory period will apply and will expire SIX (8) MONTHS from the mailing date of this communication, even if timely filed, may reduce any service will be supposed by the SIX of CR 1.7460. Fallius to reply which the set or excended period for major will be stated to the communication, even if timely filed, may reduce any service will be supposed by the SIX of CR 1.7460. Status 1) ○ Responsive to communication(s) filed on 30 August 2006. 2a) □ This action is FINAL. 2b ○ This action is non-final. 3) □ Since this application is in condition for allowance except for formal matters, prosecution as to the merits is closed in accordance with the practice under Ex parte Quayle, 1935 C.D. 11, 453 O.G. 213. Disposition of Claims 4) ○ Claim(s) 1-5.38-50.55-61.63.64.66-71 and 85-91 is/are pending in the application. 4a) Of the above claim(s) is/are withdrawn from consideration. 5) □ Claim(s) is/are allowed. 6) ○ Claim(s) 1-5.38-50.55-61.63.64.66-71 and 85-91 is/are rejected. 7) □ Claim(s) is/are allowed. 8) □ Claim(s) is/are allowed. 8) □ Claim(s) is/are allowed. 9) □ The specification is objected to by the Examiner. 10) □ The drawing(s) filed on is/are: a) □ accepted or b) □ objected to by the Examiner. Applicant may not request that any objection of the drawing(s) be hald in abeyance. See 37 CFR 1.85(a). Replacement drawing sheet(s) including the correction is required if the drawing(s) is objecte		Office Action Summary	Examiner	Art Unit			
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Application/Control Number: 10/674,553

Art Unit: 3731

The after final amendment of 08-30-2006 has been received and entered.

Claim Rejections - 35 USC § 102

The following is a quotation of the appropriate paragraphs of 35 U.S.C. 102 that form the basis for the rejections under this section made in this Office action:

A person shall be entitled to a patent unless -

- (b) the invention was patented or described in a printed publication in this or a foreign country or in public use or on sale in this country, more than one year prior to the date of application for patent in the United States.
- (e) the invention was described in (1) an application for patent, published under section 122(b), by another filed in the United States before the invention by the applicant for patent or (2) a patent granted on an application for patent by another filed in the United States before the invention by the applicant for patent, except that an international application filed under the treaty defined in section 351(a) shall have the effects for purposes of this subsection of an application filed in the United States only if the international application designated the United States and was published under Article 21(2) of such treaty in the English language.

Claims 1-5 and 85-91 are rejected under 35 U.S.C. 102(b) as being anticipated by Whayne, et al.-5865791.

Whayne discloses the placement of a mesh membrane inside an LAA to occlude and seal the ostium of the LAA against passage of emboli into or out of the LAA. The porous mesh will allow for tissue ingrowth. As the wires of the mesh when expanded would contact the inner circumferential wall of the LAA, it stands to reason that this would meet the language that at least a portion of the device is in "substantial sealing contact with the inside of the LAA". If the wires of the frame did not substantially seal, the examiner contends that emboli would be able to exit the LAA through the ostium.

Claim Rejections - 35 USC § 103

The following is a quotation of 35 U.S.C. 103(a) which forms the basis for all obviousness rejections set forth in this Office action:

(a) A patent may not be obtained though the invention is not identically disclosed or described as set forth in section 102 of this title, if the differences between the subject matter sought to be patented and the prior art are such that the subject matter as a whole would have been obvious at the time the invention was made to a person having ordinary skill in the art to which said subject matter pertains. Patentability shall not be negatived by the manner in which the invention was made.

The factual inquiries set forth in *Graham* v. *John Deere Co.*, 383 U.S. 1, 148 USPQ 459 (1966), that are applied for establishing a background for determining obviousness under 35 U.S.C. 103(a) are summarized as follows:

- 1. Determining the scope and contents of the prior art.
- 2. Ascertaining the differences between the prior art and the claims at issue.
- 3. Resolving the level of ordinary skill in the pertinent art.
- 4. Considering objective evidence present in the application indicating obviousness or nonobviousness.

This application currently names joint inventors. In considering patentability of the claims under 35 U.S.C. 103(a), the examiner presumes that the subject matter of the various claims was commonly owned at the time any inventions covered therein were made absent any evidence to the contrary. Applicant is advised of the obligation under 37 CFR 1.56 to point out the inventor and invention dates of each claim that was not commonly owned at the time a later invention was made in order for the examiner to consider the applicability of 35 U.S.C. 103(c) and potential 35 U.S.C. 102(e), (f) or (g) prior art under 35 U.S.C. 103(a).

Claims 38-43,45-50,55-61,63,64 and 66-71 are rejected under 35 U.S.C. 103(a) as being unpatentable over Whayne, et al.-'791 in view of Cottonceau-5375612.

Whayne discloses the method as claimed with the exception of the specifics of the mesh materials and the anchoring elements. However, the examiner contends that the mesh materials are all well known to those of skill in the art and would therefore have been obvious choices as they provide an effective mesh for filtering and allowing tissue-ingrowth. Cottonceau discloses the use of anchors 19 on an intravascular device. It would have been obvious to have provided Whayne's device with anchoring elements to prevent the movement of the mesh within the LAA.

Double Patenting

The nonstatutory double patenting rejection is based on a judicially created doctrine grounded in public policy (a policy reflected in the statute) so as to prevent the unjustified or improper timewise extension of the "right to exclude" granted by a patent and to prevent possible harassment by multiple assignees. A nonstatutory obviousness-type double patenting rejection is appropriate where the conflicting claims are not identical, but at least one examined application claim is not patentably distinct from the reference claim(s) because the examined application claim is either anticipated by, or would have been obvious over, the reference claim(s). See, e.g., *In re Berg*, 140 F.3d 1428, 46 USPQ2d 1226 (Fed. Cir. 1998); *In re Goodman*, 11 F.3d 1046, 29 USPQ2d 2010 (Fed. Cir. 1993); *In re Longi*, 759 F.2d 887, 225 USPQ 645 (Fed. Cir. 1985); *In re Van Ornum*, 686 F.2d 937, 214 USPQ 761 (CCPA 1982); *In re Vogel*, 422 F.2d 438, 164 USPQ 619 (CCPA 1970); and *In re Thorington*, 418 F.2d 528, 163 USPQ 644 (CCPA 1969).

A timely filed terminal disclaimer in compliance with 37 CFR 1.321(c) or 1.321(d) may be used to overcome an actual or provisional rejection based on a nonstatutory double patenting ground provided the conflicting application or patent either is shown to be commonly owned with this application, or claims an invention made as a result of activities undertaken within the scope of a joint research agreement.

Effective January 1, 1994, a registered attorney or agent of record may sign a terminal disclaimer. A terminal disclaimer signed by the assignee must fully comply with 37 CFR 3.73(b).

Claims 1-5,38-50,55-61,63,64,66-71 and 85-91 are provisionally rejected on the ground of nonstatutory obviousness-type double patenting as being unpatentable over the claims of copending Application No. 10/364910, 10/830964 and 11/009392.

Although the conflicting claims are not identical, they are not patentably distinct from each other because this application's claims are merely broader in most respects that those of the cited applications, with the exception of obvious alternative materials, or the use of a specific trans-septal catheter. One skilled in the art would recognize the usefulness of the claimed materials for the mesh given their intrinsic characteristics. The use of a trans-septal catheter to gain access to the claimed area of the heart would be obvious in view of the knowledge that this is the type of procedure that trans-septal catheters normally find their niche.

This is a <u>provisional</u> obviousness-type double patenting rejection because the conflicting claims have not in fact been patented.

Response to Arguments

Applicant's arguments with respect to all the claims have been considered but are most in view of the new ground(s) of rejection.

Conclusion

Any inquiry concerning this communication or earlier communications from the examiner should be directed to Glenn K. Dawson whose telephone number is 571-272-4694. The examiner can normally be reached on M-Th 7:30-5:00.

If attempts to reach the examiner by telephone are unsuccessful, the examiner's supervisor, Anhtuan T. Nguyen can be reached on 571-272-4963. The fax phone

number for the organization where this application or proceeding is assigned is 571-273-8300.

Information regarding the status of an application may be obtained from the Patent Application Information Retrieval (PAIR) system. Status information for published applications may be obtained from either Private PAIR or Public PAIR. Status information for unpublished applications is available through Private PAIR only. For more information about the PAIR system, see http://pair-direct.uspto.gov. Should you have questions on access to the Private PAIR system, contact the Electronic Business Center (EBC) at 866-217-9197 (toll-free). If you would like assistance from a USPTO Customer Service Representative or access to the automated information system, call 800-786-9199 (IN USA OR CANADA) or 571-272-1000.

Glenn K Dawson Primary Examiner Art Unit 3731

Gkd 27 September 2006